

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JOHN R. ATCHLEY, a married man,  
Plaintiff,

V.

PEPPERIDGE FARM, INC., a  
Connecticut corporation,

Defendant.

MICHAEL GILROY, a married man,

Plaintiff,

17

PEPPERIDGE FARM, INC., a  
Connecticut corporation,

Defendant.

No. CV-04-452-FVS  
No. CV-04-453-FVS

ORDER DENYING MOTION FOR  
PARTIAL SUMMARY JUDGMENT

**THIS MATTER** came before the Court pursuant to Plaintiffs' motions for partial summary judgment. The Court heard oral argument in this matter on May 18, 2005. Plaintiffs were represented by Daniel Tiffany. Defendant was represented by Jeffrey Supinger.

## BACKGROUND

Defendant Pepperidge Farm, Inc., ("PFI") is well known producer of baked goods, which it sells in retail food stores throughout the United States. In order to deliver its products, PFI employs a force of independent contractors, to whom it grants geographically exclusive distributorships. PFI currently has over 3,000 distributors nationwide. Sometime during March 2003, two PFI

1 distributorships were advertised for sale in Spokane, Washington.

2 Mr. Spangler advertised for sale his exclusive distributorship  
3 of consigned PFI food products for an area described as "North  
4 Spokane to Colville" for the sale price of \$229,500.00. Plaintiff  
5 Gilroy answered the advertisement by calling the number listed and  
6 speaking to Mr. Spangler. However, thereafter, Plaintiff was  
7 referred to representatives of PFI to discuss the sale of the  
8 distributorship with Mr. Spangler.

9 At the same time, PFI advertised for sale a second exclusive  
10 distributorship of consigned PFI food products in an area described  
11 as "Spokane Valley and Northern Idaho" for the sale price of  
12 \$365,508.00. The previous owner of this distributorship, Mr. Godwin,  
13 had abandoned his route, forcing PFI to offer it for sale on behalf  
14 of Mr. Goodwin. Plaintiff Atchley met with a PFI employee to discuss  
15 the purchase of this PFI distributorship.

16 Plaintiff Atchley purchased the "Spokane Valley and Northern  
17 Idaho" distributorship, and Plaintiff Gilroy purchased the "North  
18 Spokane to Colville" distributorship. Plaintiffs both entered into  
19 separate Consignment Agreements with PFI, which granted Plaintiffs  
20 the "exclusive right to distribute [PFI] Consigned Products to retail  
21 stores" within their respective territories. The Agreement also  
22 granted Plaintiffs the right to use PFI's trade name, trademark and  
23 distinguishing colors" on Plaintiffs' vehicles and equipment pursuant  
24 to the conditions set forth in the Consignment Agreement.

25 Plaintiff Atchley paid a \$25,000 down payment to PFI and  
26 financed the remainder of the purchase amount through Bank of

1 America. Plaintiff Atchley's check was made payable to PFI because  
2 Mr. Goodwin had "abandoned his route" and PFI was forced to sell the  
3 distributorship on behalf of Mr. Goodwin. PFI contends that the down  
4 payment was received "for the benefit of Mr. Goodwin" and was applied  
5 to Mr. Goodwin's account. PFI further contends that Mr. Goodwin  
6 ultimately received net proceeds from the sale of his distributorship  
7 after paying Mr. Godwin's bank loan debt of \$173,638.67, which PFI  
8 guaranteed.

9 Plaintiff Gilroy paid 10 percent down for his distributorship  
10 and financed the remainder. Plaintiff Gilroy paid the purchase price  
11 in the form of a \$269,550 check from Bank of America, a \$4,450 check  
12 from Sterling Savings Association and an additional \$25,500 personal  
13 check. Bank of America disbursed a check in the amount of  
14 \$269,550.00 made payable to "David Spangler and Pepperidge Farm,  
15 Inc." \$260,884.37 went to pay off Mr. Spangler's bank loan to Bank  
16 of America, which PFI guaranteed, \$25,500 was paid directly to Mr.  
17 Spangler, and \$9,186.28 was paid to Mr. Spangler after reconciling  
18 the sums owed PFI for outstanding inventory, commissions, and stale  
19 charges.

20 Plaintiffs each filed separate actions in Spokane County  
21 Superior Court against Defendant for recision of contract and damages  
22 for breach of contract, misrepresentation, and violation of  
23 Washington's Franchise Investment Protection Act. PFI removed both  
24 actions to this Court. Plaintiffs now move for partial summary  
25 judgment on their claim that Defendant violated the Washington  
26 Franchise Investment Protection Act.

## **SUMMARY JUDGMENT STANDARD**

A moving party is entitled to summary judgment when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 316, 323, 106 S.Ct. 2548 (1986). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982). The underlying facts and inferences drawn from facts are viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 572, 586-87, 106 S.Ct. 1348, 1356 (1986). The party moving for summary judgment has the burden to show initially the absence of a genuine issue concerning any material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159, 90 S.Ct. 1598 (1970). Once the moving party has met its initial burden, the burden shifts to the nonmoving party to establish the existence of an issue of fact regarding an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 323-24, 106 S.Ct. 2548. The non-moving party cannot rely on conclusory allegations alone to create an issue of material fact. *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993). There is no issue for trial "unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511 (1986).

11

1                   **DISCUSSION**

2                   Plaintiffs move the Court for partial summary judgment, holding  
3                   that PFI violated the Washington Franchise Investment Protection Act  
4                   ("FIPA"), RCW 19.100 et seq. The FIPA requires the owner of a  
5                   franchise to register the franchise with the Washington State  
6                   Securities Division of the Department of Financial Institutions. RCW  
7                   18.100.040. PFI acknowledges that it is not registered with the  
8                   State of Washington as a franchise, but contends it is not obligated  
9                   to do so because the FIPA is inapplicable.

10                  For the FIPA to apply, the arrangement between the parties must  
11                  meet the statutory definition of a "franchise". Under the FIPA, a  
12                  "franchise" is defined as:

13                  (a) An agreement, express or implied, oral or written, by  
14                  which:

15                  (I) A person is granted the right to engage in the business  
16                  of offering, selling, or distributing goods or services  
17                  under a marketing plan prescribed or suggested in  
18                  substantial part by the grantor or its affiliate;

19                  (ii) The operation of the business is substantially  
20                  associated with a trademark, service mark, trade name,  
21                  advertising, or other commercial symbol designating, owned  
22                  by, or licensed by the grantor or its affiliate; and

23                  (iii) The person pays, agrees to pay, or is required to  
24                  pay, directly or indirectly a franchise fee.

25                  RCW 19.100.010(4).

26                  Here, to establish that they had a franchise relationship with  
27                  PFI, Plaintiffs must demonstrate that (1) PFI granted Plaintiffs the  
28                  right to distribute goods under a marketing plan substantially  
29                  provided by PFI; (2) operation of Plaintiffs' businesses was  
30                  substantially associated with PFI's trademark; and (3) Plaintiffs

1 paid PFI a franchise fee. Because all three prongs of this test must  
2 be met before the FIPA applies, the Court focuses first on the most  
3 disputed prong: whether Plaintiffs paid a franchise fee.

4 "Franchise fee" is defined, in pertinent part, as

5 any fee or charge that a franchisee or subfranchisor is  
6 required to pay or agrees to pay for the right to enter  
7 into a business or to continue a business under a franchise  
8 agreement, including, but not limited to, the payment  
9 either in lump sum or by installments of an initial capital  
10 investment fee, any fee or charges based upon a percentage  
11 of gross or net sales whether or not referred to as royalty  
12 fees, any payment for the mandatory purchase of goods or  
13 services or any payment for goods or services available  
14 only from the franchisor, or any training fees or training  
15 school fees or charges; however, the following shall not be  
16 considered payment of a franchise fee (a) the purchase or  
17 agreement to purchase goods at a bonafide wholesale price  
18 (b) the purchase or agreement to purchase goods by  
consignment; if, and only if the proceeds remitted by the  
franchisee from any such sale shall reflect only the bona  
fide wholesale price of such goods; (c) a bona fide  
commission or compensation plan that in substance reflects  
only a bona fide wholesale transaction; (d) the purchase or  
lease or agreement to purchase or lease supplies or  
fixtures necessary to enter into the business or to  
continue the business under the franchise agreement at  
their fair market or rental value; (e) the purchase or  
lease or agreement to purchase or lease real property  
necessary to enter into the business or to continue the  
business under the franchise agreement at the fair market  
or rental value ....

19 RCW 19.100.010(f)(12) (emphasis added).

20 There are very few Washington cases discussing franchise fees  
21 under the FIPA. The statute suggests that a franchise fee includes  
22 "fees hidden in the franchisor's charges for goods or services."  
23 *Corp. v. ARCO*, 45 Wash. App. 563, 568, 726 P.2d 66 (1986) (holding  
24 that payments for the rental of property not at fair market value  
25 will constitute a franchise fee). Washington courts have recognized  
26 that a franchise fee may be indirect, including fees for goods or

1 services. For example, a franchise existed where a principle  
2 admitted that initial charges to the agent included cost recovery for  
3 training and marketing costs. *Lobdell v. Sugar 'N Spice, Inc.*, 33  
4 Wash. App. 881, 892, 658 P.2d 1267 (1983) (holding that charges for  
5 the cost of finding retail locations, and company advertising and  
6 training may constitute a hidden franchise fee). Similarly, a  
7 franchise was found where the franchisor charged the franchisee  
8 "rent" for use of the premises based on a percentage of gross  
9 revenues rather than any estimation of fair market value of the  
10 premises. *Corp v. Atlantic-Richfield Co.*, 45 Wash. App. 563, 569,  
11 726 P.2d 66 (1986). See also *Blanton v. Mobil Oil Corp.*, 721 F.2d  
12 1207, 1220 (9th Cir. 1983) (mandatory purchases of motor oil and  
13 other products constituted franchise fee). However, a franchise fee  
14 was not found where the purported franchise agreement allowed for a  
15 fixed rate to be paid to the agent, while a markup was retained by  
16 the principle. *Corporate Resources, Inc. v. Eagle Hardware & Garden,*  
17 *Inc.*, 115 Wash. App. 343, 350, 62 P.3d 544 (2003) (holding that  
18 profit margins on installation contracts are not characterized as an  
19 indirect franchise fee under FIPA).

20 Here, Plaintiffs argue that the amount they paid to purchase the  
21 PFI distributorships (\$225,000 paid by Mr. Atchley and \$299,500 paid  
22 by Mr. Gilroy) was a franchise fee because they paid for the "right  
23 to enter into business" with PFI. However, PFI argues that  
24 Plaintiffs both purchased a distributorship, not the right to enter  
25 into a distributorship, and that Plaintiffs both purchased their  
26 distributorships from the previous owner of the distributor, not PFI.

1       The Court concludes that material issues of fact preclude  
2 summary judgment on Plaintiffs' claim that Defendant violated FIPA  
3 because Plaintiffs have not shown that they paid a franchise fee.  
4 Although Plaintiffs argue that the money they paid to purchase their  
5 PFI distributorships really constituted a "fee or charge" that  
6 Plaintiffs "were required to pay for the right to enter into a  
7 business" with PFI, RCW 19.100.010(12), PFI submitted evidence  
8 showing that Plaintiffs' purchased their PFI distributorships from  
9 the previous owners of the distributors, not PFI. Plaintiff did not  
10 refute this evidence. Plaintiffs have not shown that they paid PFI  
11 any money for the "right to enter into business" with PFI.  
12 Plaintiffs have not shown that there were any hidden fees in their  
13 purchase prices or that PFI retained any of the money paid for the  
14 purchase of the distributorship.

15       The Court notes that the primary purpose of the FIPA legislation  
16 was to protect franchisees from losing money invested in the  
17 franchise. *See Lobdell*, 33 Wash. App. at 888. At least one  
18 Washington court has found this to be critical in making a  
19 determination regarding the presence of a franchise fee. *See*  
20 *Corporate Resources, Inc. v. Eagle Hardware & Garden, Inc.*, 115 Wash.  
21 App. 343, 350, 62 P.3d 544 (2003) (holding that contractor for  
22 hardware store was not a franchise where there was no "unrecoverable  
23 investment"). Here, Plaintiffs have not shown that they made any  
24 unrecoverable investment in PFI. Nor does the record reflect that  
25 Plaintiffs' predecessors, Mr. Spangler and Mr. Goodwin, paid any  
26 unrecoverable investment in PFI. Therefore, the Court cannot

1 conclude that Plaintiffs' purchases of their respective  
2 distributorships from Mr. Spangler and Mr. Goodwin constitutes a  
3 franchise fee.

4 **CONCLUSION**

5 Based on the foregoing analysis, the Court concludes that  
6 material issues of fact exist precluding summary judgment on the  
7 issue of whether Defendant violated the FIPA. The undisputed facts,  
8 when viewed in the light most favorable to Defendant, do not support  
9 a conclusion that Plaintiffs paid a franchise fee. The undisputed  
10 evidence shows only that Plaintiffs purchased two PFI  
11 distributorships. The Court does not engage in further analysis of  
12 the other prongs of the FIPA test. Accordingly,

13 **IT IS HEREBY ORDERED:**

14 1. Plaintiffs' Motion for Partial Summary Judgment, (**Ct. Rec.**  
15 **2 in CV-04-452-FVS**) (**Ct. Rec. 2 in CV-04-453-FVS**) is **DENIED**.

16 2. Defendant's Motion to Compel, (**Ct. Rec. 62 in CV-04-452-**  
17 **FVS**) (**Ct. Rec. 62 in CV-04-453-FVS**) is **GRANTED IN PART**.

18 Plaintiffs shall provide Defendant with all discovery  
19 related to Plaintiffs' future expectation damages within  
20 two weeks.

21 **IT IS SO ORDERED.** The District Court Executive is hereby  
22 directed to enter this Order and furnish copies to counsel.

23 **DATED** this 20th day of May, 2005.

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s/ Fred Van Sickle  
25 Fred Van Sickle  
26 Chief United States District Judge